corporation laws of Delaware conferred such power upon the board of directors and the majority of the debenture holders. The purpose of the transaction was to hinder and delay certain creditors. If, acting upon purported authorizations from the board of directors and all stockholders, the Radiator Corporation had sought to achieve the purpose of the Reorganization Committee by a voluntary transfer of all of the assets to a new corporation, the conveyance would have been fraudulent in law as to dissenting debenture holders. It would have been a fraudulent conveyance even if the transaction had been entered upon solely in the interest of the debenture holders, in a well-founded belief that it would prove to their advantage, and although full payment of the indebtedness had been contemplated. *Means* v. *Dowd*, 128 U. S. 273.[10] The illegality would not have been avoided by coupling the transfer later with the appointment of a receiver. *Shapiro* v. *Wilgus*, 287 U. S. 348, 354-5. Nor could the illegality be avoided by first securing the appointment of receivers and then effecting the transfer through a receivers' sale. Since the purpose was fraudulent in law, the rights of the non-assenting creditors cannot be impaired by the Corporation's admission of the self-serving allegations of the bill. Compare *Harkins* v. *Brundage*, 276 U. S. 36.

The power of the District Court was invoked, not to enforce rights of creditors, but to defeat them. The fact that the means employed to effect the fraudulent conveyance was the judgment of a court and not a voluntary transfer does not remove the taint of illegality.[11] *Jackson* v. *Ludeling*, 21 Wall. 616; compare *Jones* v.

[10] Similarly, it has been held that an assignment made for the benefit of creditors, by one who is solvent, to avoid temporary embarrassment and sacrifice of assets, is a fraudulent conveyance as to those who have not consented; and that the conveyance will be set aside to the extent necessary to permit non-assenting creditors to levy execution. Burt *v.* McKinstry, 4 Minn. 204; Gardner *v.* Commercial Nat. Bank, 95 Ill. 298.

[11] "An execution sale under a consent judgment, where the consent is, in effect, not the act of the defendant, but that of the plaintiff prosecuting the action, is in reality merely a voluntary transfer. To give it any better standing would be the grossest sacrifice of substance to form." Title Ins. & Trust Co. *v.* California Development Co., 171 Cal. 173, 210. See also, Metcalf *v.* Moses, 35 App. Div. 596; 161 N. Y. 587; Merchants Bank *v.* Burnet, 33 N. J. Eq. 486; Atwater *v.* American Exchange Bank, 152 Ill. 605; Skinner *v.* Case Threshing Machine Co., 182 N. E. 99 (Ind.); Hill *v.* Pioneer Lumber Co., 113 N. C. 173.

Railroad Co., 6 Wall. 752; *Northern Pacific R. R.* v. *Boyd*, 228 U. S. 482, 507. Nor is it material that the Corporation became insolvent later, long before entry of the order of sale, and that, but for the appointment of receivers, some non-assenting debenture holders would have obtained a preference. The lack of equity in the bill when filed is not cured by the insolvency later occurring. Compare *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491. Moreover the insolvency which supervened was precipitated by the Reorganization Committee, then the only plaintiffs in this suit. It was at their request that the Bankers Trust Company, as trustee, declared the principal of the debentures due; recovered judgment thereon for $10,673,000; and intervened as party plaintiff. These acts were steps in carrying out the Plan in which the Corporation, the Committee and the Trust Company cooperated.

The sale and reorganization being in law fraudulent as to the petitioners in No. 64, it remains to consider the relief to which they are entitled. If, as in *Shapiro* v. *Wilgus*, 287 U. S. 348, 357, the reorganization had been effected by a voluntary transfer and thereafter receivers had been appointed by the federal court, these creditors would, upon recovery of judgment, have been "entitled to an order in the alternative either for the payment of the judgment out of the assets in the hands of the receivers or in default thereof for leave to issue execution." The relief and the procedure should be the same here, although these petitioners are not judgment creditors, and the transfer followed the appointment of receivers. They should be paid in full upon establishing their claims in this case, because they were prevented by the interlocutory order appointing receivers from proceeding against the assets, fraudulently transferred, and thereby securing a lien, which would have yielded them full payment. Compare *Metcalf* v. *Barker*, 187 U. S. 165, 174; *Freedman's Savings Bank* v. *Earle*, 110 U. S. 710; *Chittenden* v. *Brewster*, 2 Wall. 191.[12]

Nothing in the indenture with the Bankers Trust Company, or in its action as trustee thereunder, interferes with affording them this relief. That instrument expressly reserves to the individual debenture holders the right to collect interest and principal in an action at law. If that right was impaired by the acts of the Trust

[12]See also Metcalf *v.* Moses, 35 App. Div. 596; 161 N. Y. 587; Johnston *v.* Straus, 26 Fed. 57.

Company, in declaring the principal of the debentures due and securing judgment thereon, equity will grant relief; because those acts, done at the request of the Reorganization Committee, were incidents of the Plan which we hold was fraudulent in law as to these petitioners.[13] The debenture holders who, by assenting to the Plan, cooperated with the Corporation and the Reorganization Committee, are in no position to complain that these petitioners will fare better than they. Compare *Davis* v. *Virginia Railway & Power Co.*, 229 Fed. 633, 642.[14] Since the assets fraudulently conveyed far exceed the amount of the claims of all non-assenting creditors, none of these could have occasion to object to the payment to these petitioners in full.

Second. Lily Clapier, the petitioner in No. 65, is the holder of $11,000 of the debentures. She refused to assent to the Plan of Reorganization, but did not seek to intervene in the receivership suit. Instead, she brought in the same court, a separate suit against the Corporation and the receivers in the nature of a bill of review. Suing on behalf of herself and all other creditors who had refused to accept the Plan, she charged that the court was without jurisdiction in equity to appoint receivers; and prayed that the decree appointing them be vacated and no further pro-

[13] The record does not show that all the debentures would not have been paid in due course under proper management, in the absence of the voluntary default made to effect the desired reorganization—and other proceedings to that end.

[14] There, in a case of reorganization, the Court said: "The holders of the bonds secured by the senior mortgages and the other debenture bondholders of the Richmond Company had the opportunity to join the petitioner in his effort to recover property which he alleged had been taken from that on which they all relied for security. They refused to enter the contest, and accepted as full payment and satisfaction of their bonds the settlement offered in the reorganization. Thus the petitioner was left as the only bondholder who chose to avail himself of the reservation and make the contest, and it follows that he alone is entitled to receive the fruit of his effort. . . . . All other creditors waived their rights, and were in the position of saying either that there was no merit in petitioner's contention, or that they were unwilling to make any effort to bring under the security the property alleged to have been diverted. Evidently, under such conditions, the property which may be recovered or brought back as a part of the assets of the Richmond Company by petitioner's efforts and expense would be applicable to his bonds. The principle is well settled by authority. Freedman's S. & T. Co. *v.* Earle, 110 U. S. 710." See, also, In re American Candy Mfg. Co., 256 Fed. 87, 88; George *v.* St. Louis Cable & Western Ry. Co., 44 Fed. 117, 120-124.

ceedings be had. The receivers and the Corporation moved to dismiss the Clapier suit on the ground that the bill failed to set forth a cause of action. These motions were granted, without passing upon the question whether in view of the fact that two of the defendants were citizens of the same State as the plaintiff, there was lack of federal jurisdiction. From the decree of dismissal she appealed to the Circuit Court of Appeals.

"A bill of review is called for only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it." *John Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 88. For this reason, a bill of review will not lie to review an interlocutory order appointing a receiver. The dismissal of the Clapier suit was, therefore, proper. But that decree should have been without prejudice to her right to prosecute her claim against the Corporation, the assets in the hands of the receivers and the new company. To this end she should be given leave to intervene in the receivership suit and there present her claim for such relief as may appear to be appropriate. As the new corporation became party to the suit when it applied for confirmation of the sale, there is here no obstacle to this procedure. Compare *National Surety Co.* v. *Coriell*, 289 U. S. 426, 438; *Kneeland* v. *American Loan Co.*, 136 U. S. 89.

Third. The First National Bank, one of the two petitioners in Nos. 62 and 63, is the holder of $68,000 of the debentures. It filed, before the hearing on ordering the sale, a petition for leave to intervene; and was permitted to do so as party defendant, but only "in subordination to and recognition of the propriety of the main proceeding." In the hearings on ordering the sale, on approving the Plan, and on confirming the sale, it took part by cross-examination of witnesses and by argument; but it did not introduce any evidence. It appealed from both the interlocutory and the final decree.

The Bank does not claim that the District Court was without equity jurisdiction or that the bill lacked equity. It concede that the court could properly lend its aid to effectuate the proposed reorganization and, to this end, might sell the assets as an entirety. Its contention is that the property held in receivership was a trust fund to be administered for the benefit of each and every creditor, and since some of the debenture holders had re-

fused to assent to the Plan of Reorganization, the court was under the duty to make the sale on such terms and under such conditions as would ensure to them, as their distributive share of the assets, the largest amount in cash which could be realized therefrom; and that the court, basing its action upon estimates offered in support of the Plan, fixed a grossly inadequate upset price and erred in confirming the sale. The respondents insist that the non-assenting debenture holders were entitled only to their distributive share of the sum for which the property could have been sold for if scrapped; and that they would, under the price paid, receive that much.

It is clear from the evidence introduced by the Reorganization Committee and the receivers that the upset price and the sale price were far below even the scrap value. The upset price fixed was $2,500,000. The entire property was sold to the Reorganization Committee for $2,550,000. At that time the cash and assets equivalent to cash alone aggregated $2,192,804.95. There was cash $1,551,615.78; and notes and accounts receivable (after deducting ample reserve for doubtful accounts) $641,189.17. Besides, there were $1,671,605.91 in raw material, goods in process and manufactured; bonds, stocks and like items valued at $88,873.41; manufacturing plants, and the warehouses in the several cities theretofore valued at $6,388,318.83; goodwill, trade marks and patents theretofore valued at $6,634,501.90; and other assets valued at $166,475.65. Moreover, the existence of the Plan of Reorganization, assented to by a vast majority of the security holders, gave assurance of at least one bidder for the entire property who had confidence that the business, if sold as an entirety as a going concern, possessed a value greater than its liquidating value; and would, if necessary to effectuate the Plan, bid for the assets in cash more than the estimated liquidating value. The upset price and the sale price were grossly inadequate.[15]

[15]It seems to have been the aim of the Reorganization Committee to have the upset price fixed at a sum which would yield to non-assenting debenture holders not more than the then market value of their bonds. At one time it has made at one of its meetings a tentative suggestion of $3,600,000. The gross inadequacy of the upset price is illustrated by the division of the $2,500,000, as applied to the ten separate parcels in which, as a formality, the property was offered before selling it as an entirety to the Reorganization Committee. Parcel A for which the upset price of $2,392,000 was set included, be-

In justifying the action taken, the Court of Appeals called attention to the fact that the non-assenting creditors had not introduced any evidence to prove their contention that the sale should not be confirmed. In view of the undisputed facts stated above, the introduction of such evidence was not indispensable. The failure to secure an adequate price seems to have been due, not to lack of opposing evidence, but to the mistaken belief that it was the duty of the court to aid in effectuating the Plan of Reorganization, since a very large majority of the debenture holders had assented to it. Moreover, the court stood in a position different from that which it occupies in ordinary litigation, where issues are to be determined solely upon such evidence as the contending parties choose to introduce. In receivership proceedings, as was held in *National Security Co.* v. *Coriell,* 289 U. S. 426, 436, every important determination by the court calls for an informed, independent judgment; and special reasons exist for requiring adequate, trustworthy information where the jurisdiction rests wholly

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sides the plants and other real estate in Pennsylvania, all the personal property except that used in connection with the plants and other real estate located in the other eight States. Parcel B embraced the plant and appurtenant real and personal property in New Jersey (including 11½ acres near Trenton and 14 dwelling houses), carried on the books at $861,179.12. The upset price on this parcel was fixed at $28,000. Parcel C embraced the plant and appurtenant real and personal property in Massachusetts (including 23 acres at Framingham), carried on the books at $592,452.64. The upset price for this parcel was fixed at $17,500. Parcel D embraced the plant and appurtenant real and personal property at North Tonawanda (including 10 acres) and Dunkirk, New York, valued on the books at $1,318,373.60. The upset price for this parcel was fixed at $37,500. Parcel E included 10 acres of land, the plants and appurtenant real and personal property and a warehouse at Chicago, Illinois, carried on the books at $605,149.43; and also the Edgewood Apartment Hotel, at Chicago, carried on the books at $51,172.31. The upset price fixed for this parcel was $17,500. Parcel F included the warehouse at Baltimore, Maryland, and the usual equipment, which was carried on the books at $33,477.93. The upset price on this parcel was fixed at $1,000. Parcel G included the warehouse equipment at Cincinnati, Ohio, which was carried on the books at $48,632.84. The upset price on this parcel was fixed at $2,250. Parcel H included the warehouse at Richmond, Virginia, which was carried on the books at $26,045.42. The upset price on this parcel was fixed at $1,000. Parcel I included two warehouses at Hempstead, New York, which was carried on the books at $30,093.51. The upset price on this parcel was fixed at $1,000. Parcel J included the warehouse at Washington, D. C., which was carried on the books at $58,536.53. The upset price on this parcel was fixed at $1,000.

upon the consent of the defendant who joins in the prayers for relief. It would be unreasonable to impose upon a few dissenting creditors the heavy financial burden of making an adequate appraisal supported by the testimony of competent experts, where, as here, the assets include extensive plants and equipment located in nine states.

The relief which the Bank seeks is that sum in cash which it would have received if the property had been sold at a proper price. To this relief it is clearly entitled. The cause is remanded to the District Court for the purpose of ascertaining the sum. In making their determination it must be borne in mind that the problem which was presented to the trial court upon the application for the receivers' sale of the assets of this manufacturing company, with its many far flung plants and warehouses, was a very different one from that with which courts have been confronted upon applications for sale on foreclosure of railroad systems. In such cases, it is ordinarily necessary that the property be sold as an entirety. The unity of the system must be preserved in both the public and the private interest, and the large amount of cash required by the upset price renders the Reorganization Committee, which ordinarily controls a large majority of the outstanding securities, practically the only bidder.[16] Compare *Kansas City Terminal Ry.* v. *Central Union Trust Co.*, 271 U. S. 445, 453-4. In the case at bar, preservation of the unity of the property was not essential. The sale of the assets in many parcels was possible; and perhaps desirable in the interest of all concerned.

A detailed appraisal must now be made of the Corporation's assets as of the date of the sale, based upon then values and the

[16]By the decree the purchaser was required to pay only $300,000 in cash, presumably to cover the expenses and fees of the Reorganization Committee, the receivers and counsel. The decree provided that on the balance of the purchase price: "The Purchaser shall be credited on account of his purchase price for Debentures and coupons and assigned claims finally established and allowed, turned over in part payment of the purchase price, with such sum as would be paid in respect of such Debentures, coupons and assigned claims out of the proceeds of sale, if the whole amount of the purchase price had been paid in cash." By this provision, customary in decrees for sales of railroad systems on foreclosure, the Reorganization Committee was relieved of the necessity of raising a large sum in cash—a necessity which naturally would deter bidders not so situated.

possibility of disposing of them in parcels, as well as an entirety; The appraisal of the current assets will present little difficulty. And the experience gained since the sale in collecting the receivables and in disposing of the inventory will be of aid. The appraisal of the property other than the current assets will require careful preparation and consideration. The inadequacy of the upset price seems to have resulted mainly from the assumption that the only alternatives were to continue to operate the properties as an entirety or to scrap all; and from a determination that the properties should not be scrapped. So far as appears, no consideration was then given to the possibility of selling the properties in such parcels as would permit of reconstituting as separate units some of the original independent concerns; or to the fact that a detailed valuation of the many items of which the assets, tangible and intangible, were composed was essential to intelligent bidding for the property in such parcels or as scrap; or to the fact that if the sale was not made as an entirety the appropriate markets for some of the parcels or lots might not be New Castle, Pennsylvania, where the sale was held. Moreover, no attempt appears to have been made then to secure bids from buyers of scrapped properties.

The history of the enterprise lends no support to the view that unless all the property was to be scrapped, all had to be sold as an entirety. The losses of the Corporation appear to have been due largely to the fundamental mistake of judgment committed in merging the several independent concerns. Before the consolidation each of the six independent concerns earned large profits. Their aggregate profits for each of the last three years before the merger had averaged $3,455,642 a year. A few months after the merger the Corporation entered upon a period of heavy losses which continued unbroken up to the time of the receivers' sale. The abrupt change from profit to loss was not the result of the general business depression. Although 1928 and 1929 were years of general business prosperity,[17] the loss of the Corporation (before payment of debenture interest) was $587,123

[17]The losses were, doubtless, due in part to the fact that already, at the end of 1927, the very lucrative "direct to the consumer" business theretofore carried on by two of the theretofore independent concerns had to be discontinued, because incompatible with the selling methods of the other plants of the consolidated company.

in 1928; and $490,371 in 1929.[18] The heavy losses during 1928, 1929 and later years (including the period of the receivership) appear to have been due in large measure to the cost of carrying unused properties. During the receivership, only the Pennsylvania plants were in operation.[19] For them there was still substantial business; and that business might then have been profitable if not burdened with the cost of carrying the many unused properties.[20] In valuing the assets the appraisers should also bear in mind that, even if part of the properties should have been sold as scrap, the Reorganization Committee was a willing purchaser for the rest.

Fourth. The International Heater Company, the other petitioner in Nos. 62 and 63, holds three promissory notes of the Corporation of $20,000 each, maturing respectively on the last days of 1931, 1932 and 1933. It refused assent to the Plan; but it does not question either that the District Court had equity jurisdiction of the cause, or that there was equity in the bill. It expressly concedes that the court could properly lend its aid to enable security holders of an unsuccessful corporation to find, through reorganization, a practical method of continuing the business. Its main objection is that under the decree entered, it is denied payment in cash of the amount to which it is entitled. The Heater Company did not learn of the application for the order of sale until after the hearing thereon had closed. Then it filed a petition to intervene; was permitted to intervene as defendant, but only "in subordination to, and recognition of, the propriety of the proceeding;" and it appealed to the Circuit Court of Appeals from both the decree ordering the sale and from that confirming it and approving the Plan. It seeks reversal of the decree on two entirely distinct and alternative grounds.

1. The Heater Company asks that, pursuant to the Plan, these notes be paid in full by the new corporation. The Plan pro-

[18] The greater part of the products of these plants was used in the new buildings. In the year 1928, the new construction in America was said to have reached its all-time record.

[19] See note 1, p. 2.

[20] During the first four months of the receivership the gross sales were $1,300,000. For the first fifty days of the receivership an operating gain of $31,917.77 was turned into a loss of $14,630.44 by reason of maintenance expense of the non-operating plants of $46,548.21.

vides that debts for merchandise or services shall be paid by the new corporation in full. These notes were part of the purchase price paid, in the latter part of 1927, for a minority interest in the stock of the Lincoln Radiator Company, the majority interest of which the Corporation had previously acquired. The Heater Company contends that the notes, being a part of the current indebtedness of the old company, and having been given for personal property, are to be deemed merchandise debts within the meaning of the Plan; but that, if the Plan as drawn does not include them, it should be amended by the court, so as to provide for the payment of the notes in full. The Court of Appeals rejected this contention. We think it was right, substantially for the reasons stated by it.

2. The Heater Company contends that, if the notes are not to be paid in full, it should receive a sum much larger than its distributive share of the purchase price paid by the new corporation. Unlike the Bank, it does not argue that the court was obliged to make an independent investigation into the value of the assets before fixing the upset price. Its contentions are that the Heater Company should not be prejudiced by its own failure to introduce evidence on that issue since it had no notice or knowledge of the hearing; that, moreover, the gross inadequacy of the price paid was due to the fact that, instead of aiming to secure for non-assenting creditors the largest possible sum in cash, the court treated the receivers' sale as merely a necessary step in effectuating the Plan of Reorganization; and hence adopted a method of selling which excluded all bidders except the Reorganization Committee. We have no occasion to discuss this argument in detail. For the reasons stated in connection with the Bank's claim, we think that the sale was made at a grossly inadequate price; and that it was invalid also as to the Heater Company. Like the Bank, the Heater Company is entitled to receive in cash its distributive share of the amount which, upon the new appraisal, shall be found to have been the fair selling value of the assets.

In Nos. 62, 63 and 64, decree reversed as to petitioners.
In No. 65, decree modified, and as modified affirmed.